

The only issue on this appeal is whether claimant's accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Respondent, which is a meat processing plant, hired claimant to work in shipping and receiving. Claimant began his training on August 1, 2006. Unfortunately, on August 8, 2006, claimant injured himself when he slammed into a wall and rack when he lost control of a battery-powered pallet jack. Claimant described the incident, as follows:

I showed up for work, went downstairs into the shipping and receiving area, was waiting on my lead man or supervisor to come out and tell me which group I would be working with that night. After some ill-fated advice -- some of the other employees kept telling me the only way I would be able to operate the equipment that was going to be required for me to operate, all I had to do was get on it and go. I got on the power pallet jack and was practicing basically a circle around a pallet of boxes. When I came around one of the turns, I was going too fast and I didn't brake soon enough and I slammed into a wall and a rack.¹

Claimant had not been certified as being qualified to operate the pallet jack. No supervisor was present at the time of the accident. And no supervisor had directed claimant to practice driving the pallet jack that evening. Consequently, on August 11, 2006, respondent terminated claimant for violating a safety rule.

This was not claimant's first encounter with the pallet jack. Claimant was initially tested on the equipment the night he started working for respondent. He later operated the pallet jack two or three other times. On one of those occasions claimant's supervisor had claimant move items from one end of the dock to the other. Claimant understood that once he was certified as being able to operate the pallet jack he would receive a raise. Furthermore, claimant had watched a video showing how to operate the equipment and he had taken a written test about how to operate the jack. And both his lead man and supervisor, as well as co-workers, had encouraged claimant on several different occasions to get on the pallet jack and learn how to operate it.²

Moreover, according to claimant, before the accident claimant's supervisors never told him the only time that he could operate the pallet jack was when they were present nor had they told him he could not use the pallet jack until he was certified. Indeed, two co-

¹ P.H. Trans. at 8.

² *Id.* at 15.

workers that were hired at the same time as claimant began operating the pallet jack without supervision and nothing was said.

Respondent's director of human resources, Russell Wright, testified that employees are told during training they should not operate the pallet jack until they are certified as being qualified.

Despite the conflicting testimony, Judge Clark ruled in claimant's favor and found that claimant's accident arose out of and in the course of his employment with respondent. The undersigned Board Member agrees.

Claimant's testimony is uncontradicted that other new employees were permitted to practice using the pallet jacks without anything being said. And claimant had been encouraged by his supervisors and co-workers to get on the pallet jack and learn how to operate it. Accordingly, this Board Member agrees with the Judge that claimant was injured while practicing to operate the pallet jack. Moreover, that activity was closely associated with claimant's job in shipping and receiving and, therefore, his August 8, 2006, accident arose out of and in the course of employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the October 27, 2006, Order entered by Judge Clark is affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
David F. Menghini, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

³ K.S.A. 44-534a.